

**SAN JOSE WATER COMPANY’S STATEMENT IN SUPPORT OF APPEAL**  
*Return of Non-Industrial Timber Management Plan (“NTMP”) #1-06NTMP-012SCL*

**INTRODUCTION**

Pursuant to Public Resources Code § 4582.7, the San Jose Water Company (“SJWC”) hereby appeals the return of Non-Industrial Timber Management Plan (NTMP) #1-06NTMP-012SCL by the Director of the Department of Forestry and Fire Protection (“CAL FIRE”). SJWC asks the Board of Forestry (“Board”) to determine its NTMP application meets the 2,500-acre eligibility requirement<sup>1</sup> of the Forest Practice Act (“FPA”).

**STANDARD OF REVIEW**

Under the FPA and the Forest Practice Rules (“FPR”), the Board is charged with reviewing an NTMP on appeal to determine if the plan is in conformance with the rules and regulations of the Board and the FPA. Cal. Pub. Res. Code § 4593.7(c); Cal. Code Regs., tit. 14, § 1054.8 (The Board determines “whether, upon the record before it, the plan is in conformance with the rules and regulations of the Board and the provisions of the Act.”). Accordingly, the Board’s review of CAL FIRE’s decision is *de novo*; the Board does not defer to CAL FIRE’s determination, but rather decides for itself in the first instance whether the NTMP satisfies the FPA and FPR. As recognized by the Supreme Court, “the Board retains the ultimate power of approval over a plan.” *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1220 (1994).

**FACTUAL SUMMARY**

The San Jose Water Company is in the business of providing water service to the San Jose area—it is not an industrial timber company and it “is not primarily engaged in the

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<sup>1</sup> A “nonindustrial tree farmer” is defined as “an owner of timberland with less than 2,500 acres who has an approved nonindustrial management plan and is not primarily engaged in the manufacture of forest products.” Cal. Pub. Res. Code § 4593.2(b).

manufacture of forest products.” Cal. Pub. Res. Code § 4593.2(b). The watershed lands owned by SJWC are a fundamental part of the company’s overall water supply. Control and management of these lands is integral to the water treatment process, and serves as the first line of defense in protecting public health from potential waterborne disease. SJWC has conducted sanitary surveys of these lands to identify potential hazards that may have a negative impact on water quality and production. For these reasons, SJWC developed an initial Watershed Management Plan in 1999, which recommended further planning and implementation of measures to protect against sanitary hazards, including catastrophic wildfires. The resulting erosion and sedimentation from wildfire impairs water quality, rendering the water unusable and reducing SJWC’s ability to provide a reliable water supply for its customers. In an effort to manage the timber and vegetative growth on these lands, reduce fire hazard,<sup>2</sup> and protect its resources, SJWC hired a local Registered Professional Forester (“RPF”) and, in late 2005,<sup>3</sup> submitted an application for an NTMP. An NTMP is designed specifically for “a person who *intends to become* a nonindustrial tree farmer with the long-term objective of an unevenaged timber stand and sustained yield.” Cal. Pub. Res. Code § 4593.3 (emphasis added). Given that SJWC’s purpose is to provide safe and reliable water to residents of the Santa Clara Valley, an NTMP made sense. SJWC wishes to manage its lands in a responsible manner and supports maintenance of a sustainable forest on its lands. AR passim.

SJWC’s RPF provided detailed environmental information to CAL FIRE, and worked diligently to address all concerns with respect to the NTMP application. *See, e.g.*, AR 000641-735; 758-785. Nonetheless, SJWC unexpectedly found itself the target of a group called

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<sup>2</sup> Indeed, a significant fire known as the “Lexington Fire” occurred in the area in 1985, burning 13,000 acres. In 1961 the “Austrian Gulch” fire burned 8,670 acres. Moreover, the Summit Fire in the summer of 2008 came within approximately one and a half miles of SJWC lands.

<sup>3</sup> The initial NTMP was withdrawn and then resubmitted in 2006 as 1-06NTMP-012SCL

Neighbors Against Irresponsible Logging (“NAIL”). SJWC had never before been singled out for “irresponsible logging” and certainly has no such intention. To the contrary, SJWC was trying to be a responsible steward of its land by obtaining a comprehensive NTMP so that it could carry-on with its business of providing high-quality drinking water to the community.

After many months, and significant expense, NAIL’s aggressive opposition raised a novel challenge to SJWC’s NTMP—that SJWC was ineligible for an NTMP because it allegedly had more than 2,500 acres of timberland. *See, e.g.*, AR 002751. The contention seemed mistaken—SJWC reviewed its application and first confirmed that the NTMP only covered 1,002 acres. AR 000003. Next, SJWC specifically looked at the question of total timberland ownership and requested a meeting with CAL FIRE to verify the evaluation criteria used by the agency. At the meeting, CAL FIRE Deputy Director Bill Snyder confirmed, consistent with the statutory and regulatory definition, that commercial harvest is a requirement for identifying timberland. SJWC even asked its RPF to run both normal and worst case analyses to make sure that, according to the most expansive interpretation of “timberland,” SJWC qualified for an NTMP. In light of the definition of “timberland,” and having confirmed the definition and criteria with CAL FIRE, SJWC was assured that it had less than 2,500 acres. AR 000068; 001234; 003118. In an effort to trip up the application, NAIL conducted an aerial reconnaissance of SJWC’s lands and, unsurprisingly given its intentions, continued to claim that SJWC had more than 2,500 acres of timberland. SJWC went back to its RPF and asked: “How this could be?” Attention quickly focused on a single issue: What did NAIL believe constitutes “timberland?”

SJWC, in its due diligence, reviewed all of its prior analyses, including aerial photographs and GIS information, and again confirmed that it did not have more than 2,500

acres of timberland. In fact, SJWC even employed Light Detection and Ranging (“LIDAR”) to allow for the differentiation of vegetation and ground characteristics. AR 001234-35. The aerial and LIDAR analysis was also field calibrated through extensive on-the-ground observations, and the RPF determined that the timberland acreage owned by SJWC was 1,971. Moreover, even if low productivity lands were generously included, the total only reached 2,388 acres. AR 001235.

All of the work was handed over to CAL FIRE so that the NTMP application could proceed. However, this information all went into what can only be described as a “black box.” CAL FIRE’s staff spent several months with the information before emerging, on September 25, 2007, with a “Notice of Ineligibility” accompanied by a six-page “Analysis of SJWC Timberland Acreage Files” written by a staff forester. AR 001880-87. In that Analysis, the forester conceded that SJWC’s work reflected a broad interpretation of timberland. AR 001882. However, the forester added that, after further evaluation, “questions arose” about how to type timberland. AR 001882. The forester then described how he engaged in a search for evidence of “historical stands,” including flights to seek out snags and scrutiny of historical aerial photographs. AR 001887.

At the end of the analysis, the forester concluded that the amount of “well stocked stands of timber” on SJWC lands is only 1,985 acres. He further concluded that the amount of land where any timber grows is only 2,405 acres. However, he presented a CAL FIRE estimate of 2,825 acres and noted that the difference is due to the inclusion of land where he found evidence suggesting such areas “historically supported stands of commercial species.” *Id.*

SJWC was baffled and more than a little frustrated to have spent nearly two years on an NTMP that CAL FIRE had just now decided was “ineligible.” In reaching this new estimate,

CAL FIRE had abandoned the criteria that it had communicated previously. The definition of “timberland” in the FPA and FPR contains no reference to “historical acreage,” so SJWC inquired with CAL FIRE about the basis for its decision, including through Public Records Act requests. To establish CAL FIRE’s previous approach to this issue, SJWC obtained all NTMPs that involved anywhere near 2,500 acres. No NTMP had undergone the type of analysis applied to SJWC’s lands. On October 2, 2007, SJWC next requested all information regarding the review of its lands.<sup>4</sup> CAL Fire did not produce any documents in response to this request for several months, but three of the documents the agency ultimately produced – none of which the agency included in the administrative record for this appeal – revealed the profound errors the agency committed in making the ineligibility determination. The first document was a “progress report” by CAL FIRE dated June 2007, which stated:

Due to the complexity of this issue and requests for clarification of the definition of and procedure for determining, “timberland” by both [SJWC’s RPF] and NAIL, Cal-Fire staff have continued to work out the *conflicting definitions in both the Forest Practice Rules and the Legislative record*.

**Exhibit A** attached hereto (emphasis added).<sup>5</sup> The second document discusses historical aerial photo review and states in relevant part:

Using our criteria for Alternative 3, the SJWC estimate of less than 2,500 acres of timberland is not accurate, I would support 2,600 – 2,700 acres if you drop the areas I’ve typed timberland from the 2003 photo but couldn’t find stands on the 1948 series.

**Exhibit B** attached hereto. The reference to “Alternative 3” is ultimately explained by the third document that CAL FIRE produced titled “Cal-FIRE Review of SJWC Timberland Acres

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<sup>4</sup> To assure that treatment was consistent for all applicants, SJWC also requested all information with respect to the Bohemian Grove NTMP, another NTMP being opposed by NAIL based on “timberland” acreage.

<sup>5</sup> Pursuant to California Code of Regulations, title 14, section 1054.6, SJWC hereby requests that the Board augment the record to include these documents (identified as Exhibits A, B, and C, and attached hereto). According to section 1054.6(b), the record shall include “all reports, findings, communications, correspondence and statements in the file of the Department relating to the plan.” These documents plainly fall within that scope and should be included.

Analysis—Estimated Acres” (“Estimated Acres Analysis”). The Estimated Acres Analysis is presented by the agency in chart form as follows:

Alternative	Acres	Potential Commercial Operations	Current Stocking	15 Cu. Ft/Ac (1983 TPA)	Trees Present	Timberland Soils	Missed Parcels
1	1,986	Yes	Yes	Yes	Yes	Yes	Yes
2	2,403	No	No	Yes	Yes	Yes	Yes
3	2,825	No	No	No	Yes	Yes	Yes
Total Land	6,677						

**Exhibit C** attached hereto.<sup>6</sup>

With the benefit of these documents, the story became relatively straightforward—CAL FIRE felt “confused” by what it believed to be “conflicting definitions,” so it invented three alternative ways of interpreting “timberland” and ultimately arrived at its Alternative 3 (the only alternative in excess of 2,500 acres). *See Exhibit A.* In doing this, CAL FIRE committed at least three errors that require reversal.

First, CAL FIRE ignored the fact that the definition of “timberland” requires lands to be susceptible to commercial harvest. Under the FPA and FPR, timberland consists of lands that must be both “available for, and capable of,” growing “any number of trees which *can be harvested commercially.*” Cal. Pub. Res. Code § 4526; Cal. Code Regs., tit. 14, § 895.1 (emphasis added). As reflected in the chart above, CAL FIRE categorically rejected the commercial harvest requirement for identifying timberlands on SJWC’s lands.

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<sup>6</sup> The date on this document is misleading. Several drafts of the forester’s Analysis document were also produced with a January 30, 2008 date—well after the Analysis was signed and sent to SJWC. The date appears to reflect when the document was collected for the Public Records Act request.

Second, CAL FIRE engaged in underground rulemaking by coming up with its own objective criterion to define “timberlands”—a criterion different from the valid, controlling regulation—in violation of the Administrative Procedures Act.

Third, had the definition of “timberland” been in any way unclear (it was not), the agency (through the Director) was required to “immediately seek clarification from the Board,” not to come up with its own definition. Cal. Code Regs. tit. 14, § 1655(c).

## **ARGUMENT**

### **I. THE DEFINITION OF “TIMBERLAND” HAS A “COMMERCIAL HARVEST” REQUIREMENT**

CAL FIRE has read the “commercial harvest” requirement out of the governing law defining “timberland.” The definition is not “conflicting,” and it does not require the invention of new criteria for its application. Rather, the FPA defines “timberland” as “land . . . which is available for, and capable of, growing a crop of trees of any commercial species used to produce lumber and other forest products, including Christmas trees.” Cal. Pub. Res. Code § 4526. The FPR in turn defines the term “crop of trees” as “any number of trees which can be harvested commercially.” Cal. Code Regs., tit. 14, § 895.1.

Rather than apply the commercial harvest requirement, CAL FIRE went on an expedition to sniff out any evidence of a tree that may have once grown on SJWC’s lands. The controlling criterion – indeed, requirement – contained in the FPA and FPR is the capacity for commercial harvest. For reasons never explained, CAL FIRE rejected that criterion (see **Exhibit C**). Given that when the criterion is applied, SJWC comes well under the 2,500 acre threshold, the Board should find that SJWC is eligible for an NTMP.

### **II. CAL FIRE ENGAGED IN UNDERGROUND RULEMAKING**

The Estimated Acres Analysis reveals that CAL FIRE considered a number of *objective* criteria for determining how to assess what constitutes timberland. Rather than revealing a discretionary analysis specific to SJWC’s property, these criteria presented a “yes or no” proposition—i.e., lands that could support “Potential Commercial Operations” either were, or were not, counted. Or, lands that meet the Timberland Productivity Act’s (“TPA”) 15 cubic feet per acre productivity threshold either were, or were not, counted.<sup>7</sup> Notably, CDF opted for Alternative 3 in making its timberland determination, indicating that susceptibility to commercial harvest, which received a “No” in CAL FIRE’s adopted alternative, was categorically rejected by the Director as a requirement for identifying “timberlands.” The analysis memorandum accompanying the agency’s “Notice of Ineligibility” confirms this in its discussion of “historical” stands. AR 001880-1887. Because this historical presence criterion was not formally adopted and not consistently applied to NTMP applicants, CAL FIRE’s analysis constituted underground rulemaking. Here, CAL FIRE used a “criterion” or “standard of general application” that has not “been adopted as a regulation and filed with the Secretary of State” in violation of the Administrative Procedures Act. Cal. Gov. Code § 11340.5.

“[P]ublic participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.” *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 569 (1996) (in addition to ensuring notice to those to be regulated and providing important information to the agency). The principles enunciated in the *Tidewater* decision are particularly relevant here. CAL FIRE conducted its analysis in a “black box,” only to emerge with a “historical evidence” criterion that

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<sup>7</sup> The TPA’s definition of “timberland” requires that “privately owned land” must be “capable of growing an average annual volume of wood fiber of at least 15 cubic feet per acre.” Cal. Gov’t Code § 51104(f). CDF’s Deputy Director correctly recognized the requirement that land support commercial harvest in proposing this as a surrogate for susceptibility to commercial harvest.



is nowhere found in the FPA or FPRs and is untethered to, and indeed was used to eliminate, the requirement that timberlands include only those lands available for and capable of commercial harvest. This underground rulemaking further requires reversal of CAL FIRE's decision. Applying the proper definition of "timberland" to SJWC's application (as CAL FIRE did with its Alternative 1), the Board should find eligibility.

### **III. CAL FIRE VIOLATED ITS OWN REGULATIONS**

California Code of Regulations, title 14, section 1655(c), provides in relevant part:

If, during the administration of rules and regulations established by the Board, the Director finds conflicts, inconsistencies, or *a lack of sufficiently clear standards* to guide the Director or persons affected by the regulations, then the Director *shall immediately seek clarification from the Board.*

(emphasis added). Note that the regulation uses mandatory language stating that the Director "shall immediately" seek clarification. Had the definition of "timberland" been unclear or "conflicting"—and for the reasons set forth above it is not—CAL FIRE should have sought clarification from the Board. Instead, CAL FIRE imposed its own definition of "timberland" through underground rulemaking.

### **CONCLUSION AND REQUESTED ACTION**


CAL FIRE acted unlawfully when it read the commercial harvest requirement out of the definition of timberland; only the Legislature by amending the FPA, or this Board through rulemaking, can change the definition of timberland. The Board should correct CAL FIRE's error by applying the definition of "timberland" contained in the FPA and FPR (a definition that requires commercial harvest) and finding that SJWC is eligible for an NTMP. A remand to CAL Fire is unnecessary and would be inappropriate because the agency has already determined that, at the most, no more than 2,402 acres of SJWC's lands are susceptible to commercial harvest (the "Potential Commercial Operations" column for CAL FIRE's Alternative 2 reads "No"). The

agency could not lawfully make a different determination on remand, to say nothing of the limits imposed by basic principles of fairness. SJWC should not be made to suffer any further delay in the processing and review of its NTMP because of CAL FIRE's inconsistent and unlawful action in deeming SJWC ineligible for an NTMP.

If CAL FIRE's unlawful determination is not reversed, SJWC will have to obtain regular, industrial timber harvesting plans—an added financial commitment that changes the economics of how to approach harvesting. All opposing this NTMP should have no misunderstanding—the denial of this NTMP does not prohibit harvesting; it only prohibits the management that could be conducted under an NTMP. Rather than be complicit in this undesirable outcome, the Board should determine SJWC is eligible for an NTMP and order review of that NTMP to proceed expeditiously.

Dated: September 26, 2008

CHRISTOPHER J. CARR  
WILLIAM M. SLOAN  
MORRISON & FOERSTER LLP

By:   
CHRISTOPHER J. CARR  
Attorneys for Appellant  
SAN JOSE WATER COMPANY

Christopher J. Carr Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105 Tel.: (415) 268-7246 Fax: (415) 268-7522 Email: CCarr@mof.com
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*Exhibit A*

*Exhibit A*

## SJWC Progress Report

The issue is whether San Jose Water Co. (SJWC) owns more than 2,500 acres of lands defined as "Timberland". Big Creek Lumber Co. (BCL) states in their Non-Industrial Timber Management Plan (NTMP) for SJWC lands that only 2,002 acres of timberland are owned by SJWC. Neighbors Against Irresponsible Logging (NAIL) has stated that their consultants estimate that SJWC has over 2,732 acres of timberland.

We requested data from both BCL and SJWC in early February 2007 after our Public Hearing for the project held on January 31, 2007. Cal-Fire received that data in May 2007.

In February 2007 Cal-Fire requested the County of Santa Clara supply assessor parcel ownership information to use as a baseline to determine all "land" owned by SJWC. This data request was denied by Santa Clara County for "Homeland Security" issues. After several discussions a Freedom of Information Act request was placed by Cal-Fire legal in June of 2007. To date, no response has been received.

In June of 2007, Cal-Fire asked BCL to provide a list of all parcels of land owned by SJWC in the State of California. Cal-Fire has also asked that SJWC certify that list. BCL is working to provide that information.

GIS data layers provided by BCL and NAIL have been converted to a common format. These layers were draped over an "unverified" ownership (SJWC) GIS layer, a USGS basemap and a 2003 aerial orthophoto image. Cal-Fire Foresters have begun to evaluate the timber type lines by both estimates using the orthophotography.

BCL provided two estimates for acreage of timberland (1,971 and 2,387 acres). NAIL estimated 2,732 acres of timberland. Of the 2,733 acres estimated by NAIL, 902 acres were typed as timberland by NAIL but not by BCL. Of the 2,387 acres estimated by BCL Foresters, 140 acres were typed as timberland by BCL but not by NAIL Consultants.

Due to the complexity of this issue and requests for clarification of the definition of and procedure for determining, "timberland" by both BCL and NAIL, Cal-Fire staff have continued to work out the conflicting definitions in both the Forest Practice Rules and the Legislative record. Local Cal-Fire staff has requested additional resources to evaluate the data provided. Additional staff from Jackson Demonstration State Forest will be in CZU during the week of June 25<sup>th</sup> to work on this project.

*Exhibit B*

*Exhibit B*

**Cal-FIRE**  
**Review of SJWC Timberland Acres Analysis**  
**Estimated Acres**

1/30/2008

<b>Alternative</b>	<b>Acres</b>	<b>Potential Commercial Operations</b>	<b>Current Stocking</b>	<b>15 Cu. Ft/Ac (1983 TPA)</b>	<b>Trees Present</b>	<b>Timberland Soils</b>	<b>Missed Parcels</b>
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2	2,403	No	No	Yes	Yes	Yes	Yes
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<b>Total Land</b>	<b>6,677</b>						

*Exhibit C*

*Exhibit C*

I've reviewed the historical aerial photo's we have at Felton for the SJWC lands. We have a 1948 series that covers a good portion of the area. The 1963 series stops at the County line and falls short of the main SJWC property. I was able to compare 3 areas on the ownership using the 1948 series and the 2003 imagery that I have for the entire ownership.

After reviewing the 1948 photo's I'd go with the following:

- It appears that there was a large fire that burned the Lexington Reservoir watershed about 15 year prior to the 1948 photos.
- I would estimate a return period of 20 – 30 years for large fires in this watershed.
- There are large conifers in the canyons (Hooker Gulch, Austrian Gulch, etc) east of Los Gatos Creek with low grown cover around them.
- I can identify scattered conifer stands in the canyons where we see snags in the 1948 photos but the stands are very open. (5 Trees/acre)
- My typing of Alternative 3 might be high in Hooker Gulch but on track for the rest of the ownership.
- The property above Monte Sereno (north of Los Gatos) has about the same coverage of Douglas fir visible in the photos from 2003.
- Using our criteria for Alternative 3, the SJWC estimate of less then 2,500 acres of timberland is not accurate, I would support 2,600 – 2,700 acres if you drop the areas I've typed timberland from the 2003 photo but couldn't find stands on the 1948 series.

Let me know when we can discuss this on a conference line. I'm in meetings Thursday from 10:00 on.